

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

HCL PARTNERS LIMITED
PARTNERSHIP, on behalf of itself and
all others similarly situated,

Plaintiff,

v.
LEAP WIRELESS INTERNATIONAL,
INC., S. DOUGLAS HUTCHESON,
DEAN M. LUVISA, AMIN I. KHALIFA and
PRICE WATERHOUSECOOPERS, LLP,

Defendants.

CASE NO. 07cv2245 BTM(NLS)

**ORDER DENYING MOTION FOR
RECONSIDERATION**

KENT CARMICHAEL, Individually and on
behalf of all others similarly situated,

Plaintiff,

v.
LEAP WIRELESS INTERNATIONAL,
INC., S. DOUGLAS HUTCHESON,
MARK H. RACHESKY, AMIN I. KHALIFA
and DEAN M. LUVISA,

Defendants.

CASE NO. 08cv0128 BTM(NLS)

Westchester Capital Management, Inc. ("Westchester") and Green & Smith
Investment Management LLC ("G&S") have filed a motion for reconsideration of the Court's
order appointing New Jersey Carpenters Pension and Benefit Fund as Lead Plaintiff. The

1 motion for reconsideration is **DENIED**.

2 “Reconsideration is appropriate if the district court (1) is presented with newly
3 discovered evidence, (2) committed clear error or the initial decision was manifestly unjust,
4 or (3) if there is an intervening change in controlling law.” School Dist. No. 1J Multnomah
5 County v. ACandS, Inc., 5 F.3d 1255, 1263 (9th Cir. 1993). A party’s failure to file
6 documents in connection with the underlying motion or opposition does not turn late-filed
7 documents into “newly discovered evidence.” Id. To prevail on the ground of newly
8 discovered evidence, the movant must show that the evidence “(1) existed at the time of the
9 trial or proceeding at which the ruling now protested was entered; (2) could not have been
10 discovered through due diligence; and (3) was of such magnitude that production of it earlier
11 would have been likely to change the disposition of the case.” Duarte v. Bardales, 526 F.3d
12 563, 573 (9th Cir. 2008).

13 Westchester and G&S argue that the evidence submitted in support of their motion
14 to be appointed lead plaintiff was sufficient to establish that they had the authority to sue on
15 behalf of the funds. The Court disagrees for the reasons set forth in the Court’s previous
16 order. Behren declared that Westchester and G&S have unrestricted decision-making
17 authority with respect to the funds that they advise and manage, but did not state that the
18 funds had specifically authorized Westchester and G&S to sue on their behalf. (Behren
19 Decl. of 1/16/08 and 3/19/08). Although Behren stated that he was authorized to “undertake
20 all acts” on *Westchester and G&S’s behalf*, including commencing legal actions, again,
21 Behren failed to state that the funds had specifically authorized Westchester and G&S to sue
22 on their behalf. (Behren Decl. of 1/16/08, ¶ 2.)

23 In support of their motion for reconsideration, Westchester and G&S have submitted
24 additional evidence showing that they have the authority to sue on behalf of the funds,
25 including a Consent Action of the Board of Trustees for The Merger Fund and The Merger
26 Fund VL, a Consent Action of the Trustee of the GS Master Trust, and letters from Chief
27 Operating Officers of investment managers to certain of the funds. However, all of these
28 documents are dated *after* the Court issued its decision. Westchester and G&S presumably

1 could have obtained this evidence at an earlier date but failed to do so. Therefore, the
2 evidence is not "newly discovered evidence" and does not warrant reconsideration of the
3 Court's order appointing New Jersey Carpenters Pension and Benefit Fund as Lead Plaintiff.¹

4 Therefore, Westchester and G&S's motion for reconsideration is **DENIED**.

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6 **IT IS SO ORDERED.**

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8 DATED: August 22, 2008



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10 Honorable Barry Ted Moskowitz
United States District Judge
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27 ¹ In Burch v. SLM Corp., 08cv1029 (WHP), Westchester & G&S presented the
additional evidence to the Southern District of New York *before* the court ruled on their
motion to be appointed lead plaintiff. Here, the additional evidence has been brought before
the Court in conjunction with a motion for reconsideration. Therefore, a different standard
applies.